RUBYNA KAUR SURINDER SINGH

v.

JASBIR SINGH HARBAJAN SINGH

HIGH COURT MALAYA, SHAH ALAM
SURIYADI HALIM OMAR J
[ORIGINATING SUMMONS NO: MT1-24-2177-02]
22 SEPTEMBER 2003

FAMILY LAW: *Matrimonial property - Order for sale, application for - Order 31 r. 1 Rules of the High Court - Whether there exists a cause or matter between contending parties to order sale - Whether it was necessary or expedient to justify sale*

This was the applicant's (wife) application for an order of sale of the matrimonial home under O. 31 r. 1 of the Rules of the High Court 1980 ('RHC'). The applicant, to satisfy the elements of "necessary or expedient" under O. 31 r. 1, to justify the sale, gave two grounds: (1) that the applicant's marriage with the respondent (husband) had broken down; and (2) that there was a possibility that the said property would be foreclosed as the payments towards the housing loan with the lending bank was in arrears.

Held:

[1] There must be a cause or matter between the contending parties to order the sale within O. 31 r. 1 RHC. The two words "cause" or "matter" must relate to some existing court proceedings pertaining to the impugned property within the context of O. 31. If *prima facie* there are no court proceedings (not necessarily confined to actions filed by contending parties) then justification of necessity or expediency of that intended sale does not exists. From the evidence adduced, there was no cause or matter in relation to the impugned property having been filed in court, *ie*, in the form of separation or divorce proceedings by the contending parties. Nor was there any litigation taken up by an interested third party. Even if there was a cause or matter, the applicant failed to prove that it appeared necessary or expedient to order the sale within O. 31 r. 1 as the grounds adduced to justify the sale were weak, speculative and tainted. Further, the respondent was still residing in the impugned property. Additionally, the applicant's bare assertion that the housing loan was not being serviced seemed to be misconceived as the documentary evidence supplied by the respondent indicated otherwise. This rejected the probability that the loan would be recalled and the property foreclosed. (pp 354 g-h, 355 a-h & 356 a-d)

[Application dismissed.]

Case(s) referred to:

Aspatra Sdn Bhd & Ors v. Bank Bumiputra Malaysia Bhd & Anor [1987] 2 CLJ 377; [1987] CLJ (Rep) 50 SC ***(refd)***

Dato' Mohamed Hashim Shamsuddin v. Attorney-General, Hong Kong [1986] 1 CLJ 377; [1986] CLJ (Rep) 89 SC ***(refd)***

KK Kumaran v. TS Sambanthamurthi [1997] 2 CLJ Supp 26 HC ***(refd)***

Koh Kok Eng v. Regina [1955] 21 MLJ 17 ***(refd)***

Munusamy v. Subramaniam & Ors [1969] 2 MLJ 108 ***(refd)***

Pahang South Union Omnibus Co Bhd v. Minister of Labour & Manpower [1981] 2 MLJ 199 ***(refd)***

PP v. Lom Shui Wang [1979] 1 MLJ 65 ***(refd)***

Re Tan Tyre Decd [1957] 23 114 ***(refd)***

Services Ltd v. Wong Liang Toon & Ors [1959] 25 MLJ 111 ***(refd)***

Si Rusa Inn Sdn Bhd & Ors v. The Collector of Land Revenue, Port Dickson & Ors [1986] 1 CLJ 584; [1986] CLJ (Rep) 673 HC ***(refd)***

Tan Lee Hong v. Letchmee [1994] 2 CLJ 570 HC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 16, 17, 25(2)
Federal Constitution, art. 121
Interpretation Acts 1948 and 1967, s. 3(b)
National Land Code, ss. 417, 256(1)
Probate and Administration Act 1959, s. 60(4)
Rules of the High Court 1980, O. 1 r. 2(1), (2), (3), O. 31 r. 1
Specific Relief Act 1950, s. 11(1)(a)

For the appellant/plaintiff - S Balan; M/s Azman Joseph & Assoc
For the respondent/defendant - R Devadason; M/s Devadason & Devadason

Reported by Usha Thiagarajah

JUDGMENT

Suriyadi Halim Omar J:

On 15 September 2003 the applicant had appeared before me for an order of sale over a piece of land, identified as A41, Flora Green Condo, Bandar Sungai Long, 43000 Kajang, Selangor Darul Ehsan (hereinafter referred to as the impugned property), currently registered in her name and the respondent. Apart from that prayer, there were other consequential ones in the like of permitting her to execute the sale in the event the respondent refused to carry it out, and later to split equally the balance of the sale price between them after taking care of the loans and liabilities. I had rejected that application unhesitatingly, and below are the reasons for the rejection.

This property, as ventilated by the applicant was bought before the marriage, with the intention of turning it as their matrimonial home on tying the knot. She further asserted that she had contributed to the deposit, and had executed the bank loan with the respondent, with the property later assigned to the lending bank. As planned, after being married they moved into the property but unplanned, ten months later, the marriage was on the rocks culminating with the applicant leaving the house.

A scrutiny of the originating summons, revealed that the applicant had adverted to the additional powers as provided for under the Schedule (para. 3) of the Courts of Judicature Act 1964, which empowers a High Court to order the sale of land if permitted by law. This seemed to be the very platform of the application. I had no quarrel with that allusion and interpretation of the additional power of sale, provided it was carried out in accordance with any written law or rules as required by s. 25(2) of the CJA 1964 thereto. The provision reads:

> 25 Powers of the High Court
>
> (1) Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and **such other powers as may be vested in it by any written law** in force within its local jurisdiction.
>
> (2) Without prejudice to the generality of subsection (1) the High Court shall have the **additional powers** set out in the Schedule:
>
> **Provided** that all such powers shall be exercised in accordance with **any written law or rules of court** relating to the same (emphasis added).

Naturally for purposes of this case, before the powers are exercised in accordance with any written law or rules of court, there must be in existence first of all that law or rules, ie, the point of reference of the sale application. Without the existence of the latter relevant precondition, no applicant would be able to take advantage of para. 3 of the Schedule, by virtue of the promulgation of the terminology 'shall' in the proviso of s. 25(2).

The next stage would necessitate the strict compliance of the contents of the relevant statute or rules of court, as stated in crystal clear terms in the proviso. Since this application is statute initiated in that its jurisdiction is statutory, then as stated earlier, any infraction which is not in accordance with the written law or rules thereto shall not be entertained (*Aspatra Sdn. Bhd & 21 Ors v. Bank Bumiputra Malaysia Bhd & Anor* [1987] 2 CLJ 377; [1987] CLJ (Rep) 50). In *Munusamy v. Subramaniam & Ors* [1969] 2 MLJ 108 Abdul Hamid J had occasion to say:

> Whatever may have been the position before the Courts of Judicature Act 1964 came into effect, it seems to me that by reason of section 25 of the Act the additional, powers of the High Court as set out in the First Schedule must be exercised only in accordance with any written law relating to the same ...

Suffian LP in *Public Prosecutor v. Lom Shui Wang* [1979] 1 MLJ 65 had remarked:

> ... paragraph 12 of the Schedule ... cannot be read alone. It must be read in conjunction with the proviso to section 25(2), so that this power must be exercised "in accordance with any written law or rules of court relating to the same ... if there are written laws or rules of court relating to power conferred on the High Court by the Schedule, it may be exercised only in accordance with them, not otherwise.

Returning to the factor of written law found under s. 25(2) of the Courts of Judicature Act, s. 3 of the Interpretation Acts 1948 and 1967 defines it as:

> "written law" means:
>
> (a) the Federal Constitution and the Constitutions of the States and subsidiary legislation made thereunder;
>
> (b) Acts of Parliament and subsidiary legislation made thereunder;
>
> (c) Ordinances and Enactments (including any Federal or State law styling itself an Ordinance or Enactment) and subsidiary legislation made thereunder; and
>
> (d) any other legislative enactments or legislative instruments (including Acts of Parliament of the United Kingdom of Great Britain and Northern Ireland and Orders in Council and other subsidiary legislation made thereunder) which are in force in Malaysia or any part thereof;

For further clarification below are some specific examples of other written laws:

i. section 60(4) of the Probate and Administration Act 1959 (Act 97) and Regulations, which reads:

> (4) An administrator may not, without the previous permission of the court:
>
> (a) mortgage, charge or transfer by sale ... any immoveable property situate in any State and for the time being vested in him;

ii. section 417 of the National Land Code which reads:

417 General authority of the Court

(1) The Court or a Judge may by order direct the Registrar or any Land Administrator to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land, and it shall be the duty of the Registrar or Land Administrator to comply with the order forthwith; and

iii. 256(1) This section applies to land under:

(a) registry title,

(b) the form of qualified title corresponding to registry title or

(c) subsidiary title.

And to the whole of any undivided share in, or any lease of, any such land.

(2) Any application for an order for sale under this chapter by a chargee of any such lease shall be made to the court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.

In the event an application falls within the ambit of a written law, the first hurdle would have been overcome. The next step must be to ensure that, as stated in s. 25(2) of the CJA, the applicant need only comply fully with the requirements of that identified relevant written law (interchangeably referred to as statute law for convenience) or rules relevant thereto.

Having perused the current originating summons, the question of whether the applicant should have selected some other written law for purposes of this application and not the current O. 31, did not merit attention. Putting it in another way, it was unnecessary for me to conduct a research for the applicant and deliberately identify the suitable written law for her benefit. As the latter had adverted to O. 31 r. 1 of the Rules of the High Court 1980, it was encumbent upon for me to merely consider whether this written law on which the application was founded, was applicable. If not, her case collapses forthwith. If the answer were to be in the affirmative, then the next step to be undertaken was to ensure that the powers to be exercised was carried out in accordance with that written law or the rules of court satisfactorily. For the benefit of this judgment I herewith reproduce O. 31 r. 1 of the Rules of the High Court 1980. It reads:

> Where in **any cause or matter** relating to any immoveable property it appears **necessary or expedient** for the purposes of the **cause or matter** that the property or any part thereof **should be sold**, the Court may order that property or part to **be sold** ... (emphasis added).

To arrive at the correct decision, even at the risk of repetition, it was pertinent that the following posers were resolved first, namely whether:

i. in the circumstances of the case as per the facts, this Order (the written law), was the correct law to cite, as opposed to some other statute;

ii. as dictated by s. 25(2) of the CJA, which demands that the powers be exercised in accordance with the written law or rules of court, thus requiring the subjection of the applicant to the rigours of O. 31, a cause or matter was in existence at the time of the application; and

iii. even if there was a cause or matter, whether in the circumstances of the case it appeared necessary or expedient to order the sale?

To satisfy the elements of "necessary or expedient' justifying the sale, the applicant had supplied two grounds in the application *viz*.:

1. with the marriage having broken down, the house had folded up as the matrimonial sanctuary; and

2. as payment was in arrears, thus raising the spectre of the bank recalling the housing loan, the eventual foreclosure of the property was a looming reality.

In support of her application, the case of *KK Kumaran v. TS Sambanthamurthi* [1997] 2 CLJ Supp 26 was brought to my attention, whereat the court pursuant to the facts there, had allowed the application pursuant to O. 31. The facts were as follows:

In 1975 the plaintiff had paid RM15,000 for a share in the impugned land, and was further given the impression by the defendant that the land would be subdivided. This allegation was not challenged. The defendant had argued that there were no statutory provision around to allow sale except in foreclosure proceedings under s. 256 of the National Land Code 1965 or under s. 145 of the same statute. The plaintiff had canvassed that under para. 3 of the Schedule to the CJA and O. 31 of the Rules of the High Court 1980, the court could order the sale. The court went the way of the plaintiff's view, and having found it necessary or expedient to do so, had ordered the land be sold. The court pronounced the order based, *inter alia*, on the grounds that:

i. as the loan was alarmingly high and default interest was mounting; and

ii. the defendant being a trustee, who could be forced to carry out the sale under s. 11(1)(a) of the Specific Relief Act 1950, the sale of the impugned land was the most logical course.

I now return to the mainstream and progressively attempt to supply the answers to the above relevant three questions ((i), (ii), and (iii)) en route to justifying my order. To regurgitate the enunciations of Abdul Hamid J and Suffian LP, suffice if I restate that the statutory powers conferred on judges of the High Court under s. 25 in the Court of Judicature Act are enabling in nature, empowering the exercise of the power provided for in the Schedule, which for purposes of this case, is the power to sell the land (*Pahang South Union Omnibus Co. Bhd v. Minister of Labour & Manpower* [1981] 2 MLJ 199). In the event the power was to be exercised, it shall be exercised only in accordance with any written law or rules relating thereto. Alluding to the canon of construction, and reading s. 25(2) CJA, I was satisfied that a presiding judge need only be subject to the written law or the rules of court. He has a choice, as the word "or" has been promulgated in the latter provision. Order 1 r. 2(1) of the RHC 1980 in crystal clear terms states that rr. (2) and (3) shall have effect in relation to all proceedings in the High Court, including any pending proceedings therein. Abdoolcader SCJ in *Dato' Mohamed Hashim Shamsuddin v. Attorney-General, Hong Kong* [1986] 1 CLJ 377; [1986] CLJ (Rep) 89 had occasion to opine that:

> It is now however necessary to turn to a consideration of the provisions of Order 1 rule 2(2) and (3) of the RHC. Rule 2(1) provides that subject to paragraphs (2) and (3) the RHC shall have effect in relation to all proceedings in the High Court but paragraph (2) enacts *inter alia* that they shall not have effect in relation to any criminal proceedings. Paragraph (3) however stipulates that nothing shall be taken as affecting any provision of any rules (whether made under the 1964 Act or any other written law) by virtue of which the RHC or any provisions thereof are applied in relation to any of those proceedings ... I think ... **the reference to "any rules" before the parenthesis in the paragraph must *ex necessitate rei* include the RHC themselves as well** ... (emphasis added).

Therefore, even though the applicant had failed to identify the specific written law except for the Rules of the High Court 1980, but as she had filed the matter in the High Court, and hence subject to the Rules of the High Court 1980, which are the relevant rules of court, the first hurdle had been overcome.

Section 16 of the Courts of Judicature Act 1964 provides that rules of courts may be made generally for regulating and prescribing the procedure and practice to be followed, for any purpose for which rules of the court may be made under any "written law". The RHC 1980 thus would indisputably fall under s. 3(b) of the Interpretation Acts 1948 and 1967, which defines "written law", (see above) especially under the heading of "subsidiary legislation made thereunder". With the RHC legislated pursuant to powers conferred by statute, though only on matters of procedure, it certainly has the force of statute (Courts of Judicature Act 1967 ss. 16 and 17; p. 2 *Malaysian High Court Practice* 1998 Desk Edition). Precedent-wise, Selventhiranathan JC in *Tan Lee Hong v. Letchmee* [1994] 2 CLJ 570 had occasion to conclude that "written law" appearing in the proviso to s. 25(2) of the CJA included the Subordinate Court Rules. Based on the above prognosis and in similar vein, I am satisfied that the Rules of the High Court 1980 is a written law. Therefore, whether under the heading of written law or rules of court, either way the essential foundation had been more than adequately established. On that premise the first poser must be answered in the affirmative.

I now touch on question (ii). As O. 31 speaks succinctly of the existence of the precondition of *cause or matter*, and unless that precondition is established first, any application would face certain rejection at the outset. What then is *cause or matter* in the context of this Order? Under s. 3 of the Courts of Judicature Act 1964, the interpretation of *cause* includes "any action, suit or other original proceeding between a plaintiff and defendant, and any criminal proceeding, whilst *matter* would include "every proceeding in court not in a *cause*." Black's *Law Dictionary* defines *cause* as "a suit, litigation, or action. Any question, civil or criminal, litigated or contested before a court of justice." As regards *matter* Black defines it as "substantial facts forming basis of claim or defense; facts material to issue; substance as distinguished from form; transaction, event, occurrence, subject-matter of controversy." Despite the wide scope of the words *cause* and *matter* or because of it, as defined by the CJA and Black (as the terminology includes is adverted to), I was satisfied that these two words must relate to some existing court proceedings pertaining to the impugned property within the context of O. 31. Without mincing words, *prima facie* if there are no court proceedings, not necessarily confined to actions filed by the contending parties, then justification of necessity or expediency of that intended sale does not exist. From the evidence, and also admitted by both parties, I had managed to gather that there was no *cause or matter* in relation to the impugned property having been filed in court in whatever form eg, a separation or even divorce proceedings by the contending parties or any litigation

taken up even by an interested third party anywhere in Malaysia. On that score, bearing in mind that the additional powers "shall be exercised in accordance with any written law or rules of court," and as the applicant had failed miserably as regards a pertinent requirement, she already at the opening stage was hard pressed to convince me. To avoid any uncertainty, I must unhesitatingly state that as I had found no *cause or matter* at the stage of the application, to grant the application would mean exercising the powers of sale in contravention of any written law or rules of court relating thereto.

As regards the third question (iii), even if there was a *cause or matter*, the applicant had failed to prove that it appeared necessary or expedient to order the sale. The requirement of *appears necessary or expedient*, which must be read in the context of the *cause or matter*, must surely mean that in the context of that scenario, it must appear vital or something which is required that the property be sold (*Services Ltd v. Wong Liang Toon & Ors* [1959] 25 MLJ 111; *Koh Kok Eng v. Regina* [1955] 21 MLJ 17; see *Re Tan Tyre Deed* [1957] 23 114; *Si Rusa Inn Sdn Bhd & Ors v. The Collector of Land Revenue, Port Dickson & Ors* [1986] 1 CLJ 584; [1986] CLJ (Rep) 673). I was and still of the view that whether it *appears necessary or expedient*, must be considered from every aspect, and not merely tailored to the solitary opinion and needs of the applicant. In fact O. 31 in clear terms legislated that the property be sold "for the purpose of the cause and matter" and not the applicant or respondent's needs. To wind up this poser, not only a vacuum existed as regards the existence of a *cause or matter*, but even the grounds supplied by the applicant too were weak, speculative and tainted.

I was quite amazed at the temerity of the affidavits sworn by the applicant, affirming that the respondent had failed to service the loan, with the property facing possible foreclosure in the immediate future. The applicant had also unabashedly alleged that even though she was a student at the time of the purchase, she had contributed to the deposit by borrowing it from her father. On that premise alone she had alleged that she was entitled to a share of the property. For what it was worth, her father on the other hand had affirmed that that deposit had been refunded by the respondent. In her affidavit she had further alleged that she was occupying the matrimonial home. The affidavit of the respondent, which was not countered as per para. 2 stated otherwise. To compound it the applicant did not deny this rebuke even in open court. Similarly, the bare assertion that the housing loan was not being serviced seemed to be misconceived and mischievous to say the least, as the documentary evidence supplied by the respondent indicated otherwise.

To sum it up, the application was doomed to fail as:

i. there was no cause or matter in existence between the contending parties, or even taken up by a third party pertaining to the impugned property at the time of the application;

ii. the evidence adduced to justify the sale was tainted, hence failing to satisfy the factor of expediency and necessity;

iii. the respondent evidentially was still residing in that impugned immoveable property; and

iv. the loan was being serviced as per the agreement by the respondent, hence rejecting the probability that the loan would be recalled and the property foreclosed.

It was based on all the above legal and factual reasons that I had dismissed the application with costs.